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IN THE

Supreme Court of the United States

October Term, 1965

No. 1200

FIRST CONGREGATIONAL CHURCH OF LOS ANGELES,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, First Congregational Church of Los Angeles* prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on January 14, 1966.

*On April 4, 1966, counsel for Petitioner was notified that the Ninth Circuit Court of Appeals had granted the motion of Inglewood Park Cemetery Association that First Congregational Church of Los Angeles be substituted for it as Respondent below. This motion was made because of the purchase on December 28, 1965, by the First Congregational Church of Los Angeles of all of the outstanding stock of Inglewood Park Cemetery Association and the subsequent dissolution by the Church of the Inglewood Park Cemetery Association. Since the notification of the order substituting parties was received after this Petition was at the printers, all references herein to Petitioner are to Inglewood Cemetery Association, but the real party in interest is the First Congregational Church of Los Angeles doing business as Inglewood Park Cemetery.

Citations to Opinions Below.

Decision and Order of the National Labor Relations Board [R. Vol. I, pp. 24-25], printed in Appendix C hereto, *infra*, pp. 5-6, are reported at 147 N.L.R.B. 803 (1964). The opinion of the Court of Appeals [R. Vol. I, pp. 34-37] printed in Appendix C hereto, *infra*, pp. 22-26, is reported at 335 F. 2d 448. The record below has not been printed because the only issue — the question of jurisdiction — is clearly presented by the Complaint and Notice of Hearing issued by the General Counsel of the N.L.R.B. [R. Vol. I, pp. 4-7] and the Answer of Respondent filed by Petitioner. [R. Vol. I, pp. 8-9.]

Jurisdiction.

The decree of the Circuit Court of Appeals was entered on January 14, 1966. [R. Vol. I, pp. 38-43.] The jurisdiction of the Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented.

1. Whether the purchase of $3,086.31 worth of goods from out of state by a cemetery whose operations are otherwise strictly local is sufficient to subject the cemetery to the jurisdiction of the National Labor Relations Board.
2. Whether there is any remaining validity to the distinction between local and interstate commerce under the Act as envisioned by the Commerce Clause and as stated by this Court in *N.L.R.B. v. Jones & Laughlin Steel Corporation,*

301 U.S. 1, 57 S. Ct. 615 (1937) in the light of the rationale applied by the court below, that even though the quantitative activities before the Board do not affect commerce, if they are representative of many others throughout the country the totality of which may become harmful to interstate commerce, jurisdiction may be asserted by the National Labor Relations Board.

3. Whether the doctrine of *de minimis* is applicable under the National Labor Relations Act to a local activity where the sole basis for asserting jurisdiction is the purchase of $3,086.31 worth of goods from out of state.

4. Whether it effectuates the policies of the Act for the National Labor Relations Board to assert jurisdiction in this case involving a strictly local operation where the only connection with interstate commerce was the purchase of $3,086.31 worth of goods from out of state.

Constitutional Provisions and Statutes Involved.

The statute, the proper application of which is involved, is the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151 *et seq.*), which confers power upon the National Labor Relations Board to prevent persons from engaging in unfair labor practices affecting commerce. Pertinent provisions of the Act are set forth in Appendix B hereto, *infra*, pp. 2-4.

The constitutional authority under which the National Labor Relations Act was enacted is the Commerce Clause (Art. 1, Sec. 8) which is set forth in Appendix A hereto, *infra*, p.1.

Statement.

Petitioner seeks review of a decree of the United States Court of Appeals for the Ninth Circuit filed January 14, 1966, enforcing an order of the National Labor Relations Board directing Petitioner to take certain action regarding the alleged commission of certain unfair labor practices by Petitioner. [R. Vol. I, pp. 38-43.]

After filing by the Union[1] of an unfair labor practice charge against Petitioner [R. Vol. I, p. 3], the Board issued its complaint based thereon (Case No. 21-CA-5420) [R. Vol. I, pp. 4-7], and a hearing before a Trial Examiner of the Board was conducted. [R. Vol. II, pp. 1-76.]

At the outset of the hearing before the Trial Examiner, Petitioner's counsel made an oral motion for a dismissal of the proceeding for lack of jurisdiction under the Act, based upon the allegations in the complaint admitted by Petitioner in its answer. [R. Vol. II, p. 6.] The Trial Examiner denied this motion. [R. Vol. II, p. 9.] Petitioner then withdrew from the hearing preferring to rest its entire defense upon the lack of jurisdiction of the subject matter. [R. Vol. II, p. 9.]

At the conclusion of the hearing, the Trial Examiner issued his decision. [R. Vol. I, pp. 11-19.] The Board subsequently adopted the findings, conclusions and recommendations of the Trial Examiner [R. Vol. I, pp. 24-25], and subsequently, pursuant to Section 10(e) of the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 160(e), petitioned the United States Court of Appeals for the Ninth

[1]Miscellaneous Warehouseman, Drivers and Helpers, Local 986, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Circuit for enforcement of its order. [R. Vol. I, pp. 26-27.]

Following the receipt of briefs and hearing of oral argument on the jurisdictional issue, the Court of Appeals entered its decree on January 14, 1966, enforcing the Board's order. [R. Vol. I, pp. 38-43.]

On application of Petitioner, issuance of the Decree has been stayed by the Court of Appeals pending the filing of this petition on or before April 10, 1966, such date to be continued pending the final disposition of the case by the Supreme Court of the United States.

The only facts pertaining to jurisdiction which were before the Board and the Court of Appeals are the following: Petitioner, a California corporation, was engaged in the operation of a cemetery located in Inglewood, California. From July, 1962 through June 30, 1963, Petitioner received in excess of $500,000 from the sale to the public of services, burial lots, crypt space, and related items. During the same period, Petitioner purchased goods directly from outside the State of California valued at $3,086.31. [R. Vol. I, pp. 4-7, 8-9.] These portions of the record are printed in Appendix D hereto, *infra*, pp. 27-28.

Reasons for Granting the Writ.

1. If the Board properly asserted jurisdiction in this case and on this record, there is no longer any "local" commerce. Petitioner's operations are essentially local. The only factual basis for the Board's assertion of legal jurisdiction was Petitioner's purchase of $3,086.31 worth of goods from outside the State of California during the period July 1, 1962 through June 30, 1963. [R. Vol. I, pp. 4-7, 8-9. See Appendix D hereto,

infra, pp. 27-28.] These facts taken alone are insufficient as a basis for jurisdiction under the Act.

This Court had declared that the Board was vested by Congress with "the fullest *jurisdictional* breadth constitutionally permissible under the *Commerce Clause.*"[2] It has not, however, declared that the jurisdictional reach of the Board is without limitations. The following principles enunciated by Mr. Chief Justice Hughes, in *N.L.R.B. v. Jones & Laughlin Steel Corporation,* 301 U.S. 1, 30, 31, 37, 57 S. Ct. 615, 621, 624 (1937), upon which the constitutionality of the act rests, are believed by Petitioner to be the correct interpretation of the act:

> ". . . The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several states' and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.
>
> ". . . The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and. thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. . . .

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[2] *N.L.R.B v. Reliance Fuel Oil Corp.,* 371 U.S. 224, 226, 83 S. Ct. 312, 313 (1963). (Emphasis supplied.)

". . . Undoubtedly, the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a complete centralized government."

Admittedly, as stated by the court below, it is within the province of Congress to regulate essentially local activity "if such activity affects commerce among the several states". [R. Vol. I, p. 36.] However, there are no facts in the present record which support the conclusion by the court below that Petitioner's activities fall within the scope of this pronouncement. The court below indicated it was "troubled" by the close question presented in the case and admitted it was "with a degree of reluctance" that they affirmed the Board, yet it felt obliged to go outside of the record to non-judicial authority to attempt to support its unsubstantiated statement that [R. Vol. I, p. 36]:

"We cannot ignore the fact that business concerned with death is 'big' business,[2] and the Board has determined that in the interlacings of business across state lines the particular operation involved can and may affect interstate commerce adversely."

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[2]"See generally Harmer, The High Cost of Dying (1963); Mitford, The American Way of Death, 39-41, 49-50 (1963); Sher, Funeral Prearrangement; Mitigating the Undertaker's Bargaining Advantage, 15 Stan. L. Rev. 415, 418-19 and nn. 12-15 (1963)."

We submit it is improper to assume facts not appearing in the record.

The four cases cited by the court below to support its finding of jurisdiction are clearly distinguishable from the within case. In *Wickard v. Filburn,* 317 U.S. 111, 63 S. Ct. 82 (1942), the parties had stipulated to a summary of the economics of the wheat industry. This court, in reaching its decision that Congress had not exceeded its power under the Commerce Clause in enacting the Agricultural Adjustment Act of 1938 (52 Stat. 31, as amended, 7 U.S.C., Sec. 1281 *et seq.*) stated [317 U.S. 111, 128-129, 63 S. Ct. 82, 91 (1942)]:

> "This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices."

In *N.L.R.B. v. Reliance Fuel Oil Corporation,* 371 U.S. 224, 83 S. Ct. 312 (1963), wherein this Court reversed the Second Circuit Court of Appeals decision denying enforcement of a Board order for lack of jurisdiction, the basis for jurisdiction was [371 U.S. 224, 225, 83 S. Ct. 312, 313 (1963)]:

> ". . . the fact that Reliance, a New York distributor of fuel oil whose operations were local, purchased within the State a substantial amount of fuel oil and related products from the Gulf Oil Corporation, a supplier concededly engaged in interstate commerce."

In *N.L.R.B. v. Fainblatt,* 306 U.S. 601, 59 S. Ct. 668 (1939), the employer was engaged in production for

commerce. It had 200 employees manufacturing more than 12,000 dozen garments per year, all of which would be shipped through interstate commerce both before and after processing. *Polish National Alliance of United States of North America v. N.L.R.B.*, 322 U.S. 643, 64 S. Ct. 1196 (1944), involved a fraternal benefit society whose activities and money-making transactions crossed many state lines and clearly affected interstate commerce.

Lacking sufficient factual basis for its determination that the Board properly asserted jurisdiction in this case, the court below has indicated that in determining whether there is the requisite affect in commerce it is not confined to the activities immediately before it. Yet there can be no remaining validity to the distinction between local and interstate commerce under the Act as envisioned by the Commerce Clause and as stated by this Court in the *Jones & Laughlin* case under the rationale applied by the court below that even though the quantitative activities before the Board do not affect commerce, if they are representative of many others throughout the country, the totality of which *may become harmful to interstate commerce,* jurisdiction may be asserted by the National Labor Relations Board. If this Court intended the scope of this rationale to be as all-inclusive as the use of it by the court below suggests, there can be no local commerce. Under this rationale, every law firm, every accounting firm, every doctor's office, every local grocery store, every four-stool hot dog stand, every three-chair barber shop, every shoe-shine stand, and every other business throughout the country previously considered to be local is subject to having their labor relations regulated by

the Board. For surely if jurisdiction is sustained here, the totality of the operations of each of these other categories of businesses is sufficient to possibly "become harmful to interstate commerce."[3]

It is submitted, therefore, that if the principles set forth in *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S. Ct. 615 (1937), retain any of their intended vitality this Court must grant certiorari and must reverse the decision by the court below that the Board properly asserted jurisdiction in this case. To hold otherwise requires a determination by this Court that there is no longer any distinction between local and national activities as the Constitution envisioned. If this be the intention let the Court now say so once and for all.

Petitioner is engaged in the most local of activities, the operation of a cemetery for interment of the deceased. In *Lawson v. Woodmere, Inc.*, 217 F. 2d 148 (4th Cir. 1954), an action under the Sherman Act,[4] a cemetery and its affiliated vault company were the defendants. The court observed that (p. 151), "their activities are clearly and *intensely* local" (emphasis added), and quoted (p. 152) with approval the follow-

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[3]Based upon information furnished by the California State Board of Barber Examiners, as of July 1, 1965, there were 22,619 licensed barbers and 13,316 barber shops in California. If the rationale applied by the court below is correct, it certainly encompasses the activities of each local barber shop because of the total impact all barber ships might have on interstate commerce.

[4]15 U.S.C. §§ 1 *et seq.* Petitioner is, of course, aware of the different coverage under the Commerce Clause of the various acts of Congress. The citations in this petition to cases involving other statutes (the Sherman Act, the Fair Labor Standards Act, etc.) are limited to those cases where this distinction is not material on the point for which the case is cited.

ing passage by the district court (120 F. Supp. 267 at 269):

> "It seems to the Court that all the arrangements made by the cemeteries are within their rights and powers and beyond the power of Congress to regulate or control. The owning and managing of a cemetery is certainly intrastate business."

This case differs entirely on the jurisdictional issue from any other cases under the Act because of the nature of the Petitioner's business. We are not here dealing with a manufactured product, a commodity or a service, the use or transportation of which can be interrupted by a labor dispute or strike. The death rate will not be affected by any such dispute. Because interment is required in California by law,[5] the bodies of all other private cemeteries in the area close operations.

It is difficult to conceive of a more local activity and one less related to commerce than the operations of a cemetery. This fact is emphasized by the extensive control of cemeteries by a multitude of state and local laws, ordinances and regulations which properly exercise the local police power in regard to the maintenance of the health and safety of the inhabitants,[6] and by the fact that cemeteries are, for the most part, maintained and operated by local religious and fraternal organizations and by the federal, state, and local governments.

Although it is obvious, it must not be overlooked that Petitioner's operation of a cemetery is in reference to

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[5]Calif. Health & Safety Code, §§ 7009, 7100, 7103.

deceased persons will be buried even if Petitioner and

[6]*E.g.*, Calif. Health & Safety Code, §§ 7000-9677; Calif. Bus. & Prof. Code, §§ 9600-9770.

immovable land, and that there are even restrictions on the discontinuance of use or sale of the cemetery after the removal (when and as permitted) of the human remains.[7]

Cemeteries, like churches, are seldom considered as commercial ventures in the usual sense of that term. The authorities are unanimous that there is no property in dead bodies, and consequently the remains of human bodies are not a subject of commerce.[8]

The "intensely" local nature of the activities of Petitioner are evidenced by the personal private acts with which the activities are concerned, the non-commercial nature of the human remains with which they are primarily concerned, and the numerous local regulations governing them. This local nature serves to distinguish the instant situation from almost every other case decided under the Commerce Clause.

The mere receipt in California from out of state of an inconsequential amount of goods does not render the intensely local activity (as distinguished from the transportation itself) subject to control of Congress. In the instant situation such purchases amounted to only $3,086.31 over a period of a year.

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[7]Calif. Health & Safety Code, §§ 7900-7906.

[8]*Cohen v. Groman Mortuary, Inc.*, 231 A.C.A. 5, 8, 41 Cal. Rptr. 574 (1964); *Gray v. Southern Pacific Co.*, 21 Cal. App. 2d 240, 68 P. 2d 1011 (1937); *Steen v. Whittington*, 9 Cal. App. 2d 445, 50 P. 2d 118 (1935); *Huntly v. Zurich Gen. Liab. & Acc. Ins. Co.*, 100 Cal. App. 201, 280 Pac. 163 (1929); *Enos v. Snyder*, 131 Cal. 68, 63 Pac. 170 (1900); *O'Donnell v. Slack*, 123 Cal. 285, 55 Pac. 906 (1899); *Wong Yung Guy*, 2 Fed. 624 (C.C.D. Calif., 1880); *Guthrie v. Weaver*, 1 Mo. App. 136 (1876); see *A. F. Hutchinson Land Co. v. Whitehead Bros. Co.*, 217 N.Y.S. 413, 418, 127 Misc. 558 (1926) aff'd 218 App. Div. 682, 219 N.Y.S. 413 (1926);

It is readily apparent that the only connection whatsoever of the Petitioner with interstate commerce is these purchases. The original shipment of such goods into California was, of course, an interstate activity subject to the power of Congress to regulate. But it does not follow therefrom that Congress had the power or, in fact, intended through enactment of the Act to regulate the local labor relations of an employer of the nature of Petitioner who operates only in California. These minimal shipments into California viewed in conjunction with the local operation of Petitioner constitute too remote and indirect an effect on interstate commerce to sustain the Board's jurisdiction in this matter. Such shipments would have to be significantly greater in volume or Petitioner's operations would otherwise have to have a more direct impact on interstate commerce in order to hold otherwise. The Constitution and the Act require a substantial effect or burden on interstate commerce to bring an activity within the federal control.

We submit that the Board has failed to show and that the Court of Appeals erred in holding that the requisite "affect" on or relationship to interstate commerce exists in this case. Obviously, if one looks hard and long enough one can find some affect on interstate commerce produced by every local sale regardless of size; yet the Constitution and the Act require more. One has only to refer to Section 1 of the Act[9] to learn that Congress only intended to enact legislation regarding activities which substantially affect interstate

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North East Coal Co. v. Pickelsimer, 253 Ky. 11, 68 S.W. 2d 769 (1934); 25 C.J.S. 1016; 15 *Cal. Jur.* 2d 58; 10 *Am. Jur.* 503.

[9]29 U.S.C. § 151.

commerce, thereby remaining within the constitutional grant of power. Thus, in Section 1 we find the phrases, "*materially* affecting, restraining, or controlling the flow of raw materials," "*substantially* burdens and affects the flow of goods," and "to eliminate the causes of certain *substantial* obstructions to the free flow of commerce". (Emphasis supplied.) Indeed, by Section 2(7)[10] itself, activity to affect commerce has to be "in commerce" or else must "burden" or "obstruct" it. The choice of such words indicates a clear requirement of substantial affect.

This Court has stated it in this manner:

> "It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'commerce', and not all commerce but commerce with foreign nations and among the several states. The expansion of enterprise has vastly increased the interests of interstate commerce, but the constitutional differentiation still obtains." *Santa Cruz Fruit Packing Co. v. N.L.R.B.*, 303 U.S. 453, 466, 58 S. Ct. 656, 660 (1938).

Yet the Record herein does not show any substantial effect or potential effect on interstate commerce in this matter.

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[10] 29 U.S.C. § 152(7).

The mere receipt in California, from out of state of an inconsequential amount of goods does not convert a local activity into one affecting interstate commerce. Thus, in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs,* 259 U.S. 200, 209, 42 S. Ct. 465, 466 (1922), in holding that the interstate movement of a major league baseball team and its equipment to play its games was merely incidental to the exhibitions, and did not affect commerce, this Court commented:

> ". . . According to the distinction insisted upon in *Hooper v. California,* 155 U.S. 648, 15 S. Ct. 207, 39 L. Ed. 297, the transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money, would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendant, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State."

The decision of the Court below conflicts in principle with the *Federal Baseball Club* case.

The decision below is also in conflict in principle with *Spears Free Clinic & Hospital v. Cleere,* 197 F. 2d 125, 126 (10th Cir. 1952), a case involving the practice

of chiropractic. In dismissing the complaint for lack of jurisdiction under the Sherman Act, the court held that the practice of the healing arts is wholly local in character, and is not brought into commerce by the fact that patients came from out of state for treatment.

Petitioner is not engaged in interstate commerce. Further, it is not engaged in manufacturing. It ships nothing outside of the State or the local area; in fact, it does no shipping at all.[11] It produces no goods and performs no services for other concerns subject to the Act. Its sales and services are only to the public.

We have been unable to find any case in which jurisdiction of the Board has been sustained where, as here, there is strictly a local operation and the sole basis for jurisdiction would be annual extra-state purchases of as little as $3,000. A distinction which appears in previously decided cases but which the Board and the court below overlooked is that between an activity which, regardless of interstate purchases, has a relation to and affect on interstate commerce (such as the operations of a hotel or of a bus company, etc.) and an activity which is strictly local. The latter does not become subject to regulation under the Act merely because of some incidental and minimal interstate purchases. For example, in *N.L.R.B. v. Holiday Hotel Management Co.*, 311 F. 2d 380 (10th Cir. 1962), the court did not

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[11]The fact that Petitioner does not ship caskets and shipping cases out of state as was the case in the mortuary cases earlier decided by the Ninth Circuit Court of Appeals clearly distinguishes our present situation from those cases, *N.L.R.B. v. Pierce Bros.*, 206 F. 2d 569 (9th Cir. 1953) *cert. den.*, 347 U.S. 915, 74 S. Ct. 514 (1954); *N.L.R.B. v. Hazen;* 203 F. 2d 807 (9th Cir. 1953).

find jurisdiction on the basis of the extra-state purchases alone, but only on the ground of such purchases and the direct relation of the hotel operation to actual interstate transportation.[12] Quoting from the Board's decisions in *Southwestern Hotels, Inc.*, 126 N.L.R.B. 1151, 1154 (1960) and *Floridan Hotel of Tampa, Inc.*, 124 N.L.R.B. 261, 263 (1959), the court commented in this connection (p. 381):

> ". . . The respondent here received more than $1,500 worth of goods, equipment, and supplies which were shipped directly to it from out of state points. While this amount is not impressive, it must be considered together with the obvious fact that 'hotels which serve a transient trade play an important role in furthering travel and in fostering commercial relationships between the inhabitants of the several states.' Labor disputes which interfere with the operations of these hotels affect the 'operations of the various media of passenger transportation' and if left unchecked, would spread to the other hotels in the area with consequent far-reaching harmful effects on interstate commerce."

This distinction is further illustrated by the case of *N.L.R.B. v. Aurora City Lines, Inc.*, 299 F. 2d 229 (7th Cir. 1962). In that case there was really little question of legal jurisdiction inasmuch as the employer was a subsidiary of an organization operating in twelve different states. However, the court found support for

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[12]With respect to the court's enforcement of the Board's order it should be noted that no exceptions were filed by the employer to the trial examiner's report finding jurisdiction, the proceeding was before the court on a petition for summary entry of an enforcement decree and the Respondent made no argument against the order.

its sustaining of jurisdiction by noting (page 231) that the employer there involved was in the transportation business which necessarily involves a direct impact on interstate commerce.

If the decision that the Act applies to the "intensely" local activities of Petitioner is not reversed it shall mean that the court below has correctly applied the rationale stated by this Court in *Polish National Alliance of United States of North America v. N.L.R.B.*, 322 U.S. 643, 64 S. Ct. 1196 (1944), that the Board may assert jurisdiction even though the quantitative activities before it do not affect commerce, if the activities are representative of many others throughout the country the totality of of which *may become harmful to interstate commerce*. This, in turn, shall mean that the distinction between local and national activities under the Act is abolished. The Board will then have achieved its apparent goal of statutory jurisdiction over all labor relations regardless of their "affect" on interstate commerce.

2. An additional reason for granting certiorari in this case is because of the great deal of uncertainty as to when the doctrine of *de minimis* announced by this Court to be applicable in labor relations cases should be applied. This Court should make a clear pronouncement to end this confusion.

In *N.L.R.B. v. Fainblatt,* 306 U.S. 601, 607, 59 S. Ct. 668, 672 (1939), this Court recognized that the maxim "de minimis non curat lex" applies in the interpretation and application of the Act. At a time when the dollar was worth about four times its present value, a transaction affecting interstate commerce under the antitrust laws in the amount of "a few thousand dollars" was considered by this Court "so insignificant" as to call for the application of the *de minimis* doctrine.

Industrial Association of San Francisco v. United States, 268 U.S. 64, 84, 45 S. Ct. 403, 408 (1925). Similarly, in *Pennsylvania Labor Relations Board v. Friedberg,* 395 Pa. 294, 148 A. 2d 909 (1959) *app. dsmd.* 361 U.S. 2, 80 S. Ct. 63 (1959), the court held that in the application of the N.L.R.A., $12,162 in services by a local firm for interstate enterprises was *de minimis* and the N.L.R.B. did not have jurisdiction. While these two cases are not directly in point, they do furnish strong support for the proposition that *de minimis* should apply in this case.

By way of contrast to the above cases is the case of *N.L.R.B. v. Aurora City Lines, Inc.,* 299 F. 2d 229 (7th Cir. 1962) to the extent that it holds that the purchase of $2,000 worth of materials from out of state was not *de minimis.* As discussed earlier, *supra,* p. 17, we believe jurisdiction in the *Aurora* case was based primarily upon the nature of the company's transportation business. However, to the extent that the Seventh Circuit Court of Appeals addressed itself solely to the *de minimis* issue, the decision, as well as the one by the court below in this matter, conflicts in principle with decisions such as *Industrial Association of San Francisco, supra,* p. 19. This Court should address itself to this conflict and end the confusion regarding the *de minimis* doctrine.

The court below indicated that it was "troubled" by the close question in this case and admitted that it was "with a degree of reluctance" that they affirmed the Board. [R. Vol. I, p. 37.] Yet they ignored the cases discussed above which applied the doctrine of *de minimis* on facts involving as much and even more money than is involved in this case.

Under the circumstances of this case, particularly in light of today's inflated dollar, where the operations are "intensely" local, where the goods received from out-of-state amount to substantially less than one per cent of the sales and would not equal the annual earnings of a single employee, and where the local labor relations of about 90 employees are involved, the impact of the goods received from out-of-state is so inconsequential that the doctrine of *de minimis* should be applied.

In choosing reluctantly to deny the applicability of the doctrine to this case, the court below relied on clearly distinguishable cases. We have previously discussed the *Aurora* case, *supra,* p. 17 *N.L.R.B. v. Stroller,* 207 F. 2d 305, 306 (9th Cir. 1953), involved the operation of a laundry and dry-cleaning establishment on an atomic energy reservation which was owned by the United States and operated by the Atomic Energy Commission. Furthermore, the respondent operator had purchased one-half of his supplies for the relevant year from out-of-state.

By way of contrast to the cases relied on by the court below, Petitioner is engaged in the operation of a cemetery and therefore is not related to interstate transportation or interstate commerce as such. Furthermore, Petitioner has no government contract and was found to have purchased only $3,086.31 worth of goods from out-of-state, an amount equal to substantially less than one per cent of its total revenues for the relevant year. We submit, therefore, that the small amount of purchases here involved could only have the remotest effect imaginable in interstate commerce and that the

de minimis maxim should properly have been and should now be applied in this case.

3. It would not effectuate the purposes of the Act to permit enforcement of the Board's order.

In *Gray v. N.L.R.B.*, 295 F. 2d 38 (9th Cir. 1960), the court below refused to enforce an order of the Board in part on the ground that it could not find "that enforcement would effectuate the purposes of the *National Labor Relations Act*". We believe that the same decision should have been reached in this case and that the court below erred in not so holding.

The essentially local nature of Petitioner's operations are of the type as to which the Board has found in numerous cases, involving such operations as race-tracks, hospitals, and real estate brokers, that it would not effectuate the policies of the Act to assert jurisdiction.[13]

We are unable to see any basis on which the Board could assert jurisdiction over cemeteries generally, or this Petitioner particularly, in view of such precedents as those referred to above. As a matter of fact, the case for declining jurisdiction over the cemetery is much stronger than in any of those operations. Accordingly, assuming for purposes of discussion that the court below properly held that legal jurisdiction exists, it would not effectuate the policies of the Act to assert jurisdiction over this Petitioner and, therefore, the Board's order should not be enforced against Petitioner.

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[13] *Hialeah Race Course, Inc.*, 125 N.L.R.B. 388 (1959); *Walter A. Kelley*, 139 N.L.R.B. 744 (1962); *Flatbush General Hospital*, 126 N.L.R.B. 144 (1960); *Seattle Real Estate Board*, 130 N.L.R.B. 608 (1961).

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD W. LUND,
PAUL R. WATKINS,
DANA LATHAM,
Counsel for Petitioner.

JOHN S. WELCH,
ROBERT B. WESSLING,
Of Counsel.

April 6, 1966,

APPENDIX A.

Constitutional Provisions.

The relevant provisions of the United States Constitution are as follows:

Art. I Sect. 8: The Congress shall have power—

* * * * *

3. To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.

Amendment X: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX B.

Statutory Provisions.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

FINDINGS AND DECLARATION OF POLICY

Sec. 1.

* * * * *

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

Sec. 2. When used in this Act —

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any

Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10.(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.

* * * * *

Sec. 10.(e) The Board shall have power to petition any court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not

been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. * * * Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX C.

Decision and Order of N.L.R.B.

United States of America, Before the National Labor Relations Board.

Inglewood Park Cemetery Association and miscellaneous Warehousemen, Drivers & Helpers, Local 986, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Case No. 21-CA-5420.

DECISION AND ORDER

On April 9, 1964, Trial Examiner David Karasick issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Trial Examiner's Decision attached hereto. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the Respondent's exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board hereby adopts as its Order, the Order recommended by the Trial Examiner and orders that the Respondent, Inglewood Park Cemetery Association, Inglewood, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as amended herein:

The Notice attached to the Trial Examiner's Decision as an Appendix is amended by inserting, after the word "assist" in the last indented paragraph before the signature line, the words "or to refrain from joining or assisting."

Dated, Washington, D. C. June 26, 1964.

Frank W. McCulloch, Chairman
John H. Fanning, Member
Gerald A. Brown, Member
National Labors Relations Board

(Seal)

Trial Examiner's Decision.

TXD-(SF)-39-64 Inglewood, Calif.

United States of America, Before the National Labor Relations Board, Division of Trial Examiners, Branch Office, San Francisco, California.

Inglewood Park Cemetery Association and Miscellaneous Warehousemen, Drivers & Helpers, Local 986, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Case No. 21-CA-5420.

Jerrold H. Shapiro, Esq., for the General Counsel.

Latham & Watkins, by R. W. Lund, Esq., of Los Angeles, Calif., for the Respondent.

Before: *David Karasick,* Trial Examiner.

TRIAL EXAMINER'S DECISION

Statement of the Case

This proceeding was heard before me in Los Angeles, California, on February 25, 1964, upon a *complaint*[1] of the General Counsel and an answer of Inglewood Park Cemetery Association, herein called the Respondent. The complaint alleges that the Respondent committed unfair labor practices in violation of Section 8(a) (1) and (3) of the National Labor Relations Act, as amended, herein called the Act. The answer denies the jurisdiction of the Board and further denies the commission of the unfair labor practices alleged. Counsel for the Respondent appeared at the hearing and moved to dismiss the complaint on the ground that the Board lacked jurisdiction. The motion was denied for the reason set forth in Section I, hereafter. Counsel for the Respondent then withdrew from the hearing. The General Counsel proceeded with his case and the hearing thereafter continued in the absence of counsel for the Respondent.

Upon the entire record[2] and from my observation of the witnesses, I hereby make the following:

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[1]The complaint, issued December 6, 1963, is based on a charge filed July 2, 1963. Copies of the complaint and the charge were duly served upon the Respondent.

[2]The unopposed post-hearing motion of the General Counsel to correct the transcript, copy of which was duly served upon the Respondent, conforms to my recollection of the testimony and is hereby granted.

Findings of Fact

I. The business of the Respondent

The Respondent is a California corporation engaged in the operation of a cemetery located in Inglewood, California. From July 1, 1962 through June 30, 1963, the Respondent received in excess of $500,000 from the sale to the public of services, burial lots, crypt spaces, and related items, and purchased goods directly from outside the State of California totaling $3086.31. In its answer, the Respondent admitted the foregoing facts alleged in the complaint with respect to the business operations of the Respondent but denied that such facts constituted a sufficient basis upon which the Board could assert jurisdiction.

I note that, based on identical facts, the Board, in an unpublished decision in *Inglewood Park Cemetery Association and Centinela Concrete Vault Company,* Case No. 21-RC-8450, decided October 11, 1963, found the Respondent had met the Board's applicable standard for assertion of jurisdiction and further found that, since the Respondent had made purchases directly from outside the State in excess of $3000, the Board had legal jurisdiction over its operations in accordance with its decision in *Aurora City Lines, Inc.,* 130 NLRB 1137. I find that, on the foregoing facts alleged in the complaint and admitted in the answer, the Respondent is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction in this case.

II. The labor organization involved

Miscellaneous Warehousemen, Drivers & Helpers, Local 986, International Brotherhood of Teamsters,

Chauffeurs, Warehousemen & Helpers of America, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. The alleged unfair labor practices

A. *The facts*

On June 26, 1963, after they had finished their work for the day, John Dzavan, Jr., John Simpson and Ruben Diaz, employees of the Respondent, went to the office of Les Coombs, business representative of the Union, to inquire about becoming members of that labor organization. Coombs explained to the 3 employees the procedure to be followed and gave them a number of authorization cards. On the following day, before and after working hours and during the lunch period, the 3 employees gave a number of such cards to their fellow workers. Diaz signed one of the cards on June 26, Simpson on June 27 and Dzavan on the morning of June 28.

During the afternoon on June 27, William Faulkner, a foreman, approached Dzavan while the latter was at work, and asked him if he had passed out union cards. Dzavan asked Faulkner who had told him so. Faulkner replied that one of the men had informed him that he had been given a union authorization card by Dzavan. Dzavan responded by requesting that he be confronted with Faulkner's informant and Faulker agreed, saying that he would return at once with him, but he did not do so. Before he left, however, Faulkner also told Dzavan that if A. H. Conquest, the Respondent's superintendent, ever found out that the employees were passing out union authorization cards he would discharge them on the spot.

On June 28, at approximately 4 p.m., the employees of the Respondent were called to attend a meeting at the Grace Chapel. Superintendent Conquest told them that he had heard they were trying to form a union, that he would not have a union and that he would fight against it. He also told the employees that workers at the Hollywood Cemetery had joined a Union and were receiving an average hourly wage which was lower than that being paid by the Respondent, who also gave its employees uniforms and a Christmas basket, and that at the Hollywood Cemetery they were dissatisfied with the union contract and were waiting for the year to expire so that they could get out of the union.

After the meeting was over, Dzavan, Simpson and Diaz, as well as Leroy Leazotte, who worked together with Dzavan as a marker trimmer, were told that Superintendent Conquest wished to see them in his office. The four employees were ushered into Conquest's office separately. Each was told he was discharged and was given his final pay check. Conquest told Dzavan that he was being discharged because his work was insufficient, Simpson because he was wasting time on the job, and Leazotte[3] because he and Dzavan had been a team for a long time and had done nothing but fool around. Diaz, who is of Spanish extraction, testified that he did not understand what Conquest had said to him at the time he handed him his final pay check.

Dzavan and Leazotte were two of the six marker trimmers employed by the Respondent whose job it was to trim the grass around the headstones in the cemetery. These employees worked in teams of two.

[3]Leazotte had signed a union authorization card on June 27.

They operated a three-wheel scooter propelled by a gasoline motor which provided the power for the two trimmers. Dzavan and Leazotte had worked together as a team in this manner for approximately 3 years. Dzavan began working for the Respondent on July 13, 1959 and worked continuously until he was discharged on June 28, 1963. When Dzavan began work for the Respondent he was receiving a wage rate of $1.65 an hour. At the time of his discharge he was receiving $2.35 an hour having received two wage increases, neither of which had been requested by him.[4]

Leazotte first began work for the Respondent in 1952 but voluntarily left his job in 1957. He returned to work for the Respondent in 1959 and worked thereafter continuously until the date of his discharge. At the time he last was employed by the Respondent in 1959 he began work at a wage rate of $1.65 an hour and thereafter received 2 or 3 wage increases. He was being paid $2.35 per hour at the time of his discharge. Before the day of the discharges, Dzavan had never been told by the Respondent that his work was insufficient nor had Leazotte ever been told that he had been fooling around or that his work was unsatisfactory.

Simpson, who was employed as a power motor operator, began work for the Respondent in 1952 and worked continuously until he was discharged on June 28, 1963. His rate of pay was $2.35 per hour at the time of his discharge and he had received 3 wage increases during

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[4]Dzavan testified that the second of these wage increases was received in September 1962, that the employees had been trying to form a union at the time and that Mr. Latteau, the owner of the cemetery, spoke to the employees and told them that he did not want a union, that they were too small an outfit to join the union and that he would give the employees a raise to keep them quiet.

the period of his employment, none of which he had requested. Although Superintendent Conquest had told Simpson that he was being discharged because he had been wasting time on the job, Simpson had never before been told by the Respondent at any time that he was either wasting time at his work or that his work was not satisfactory.

Diaz, who was employed as a stone setter, began work for the Respondent on April 15, 1959, and worked continuously until he was discharged on June 28, 1963. He was paid $1.70 per hour at the time he was first employed and received 3 or 4 wage increases, none of which he had requested, during the period of his employment. He was being paid $2.50 per hour at the time that he was discharged. He had never received any complaints about his work.

Although afforded an opportunity to do so, the Respondent offered no evidence to refute that presented by the General Counsel, but instead, as noted above, withdrew from the hearing. The undisputed evidence thus offered shows that Dzavan, Diaz and Simpson engaged in union activities by distributing union authorization cards among their fellow employees; that the Respondent had knowledge of such activities; that the Respondent was opposed to the unionization of its employees as Superintendent Conquest told them at the meeting on June 28; and that the day after learning of the union activities in question the Respondent discharged the three employees who had engaged in such acivities. Although Leazotte had signed a union authorization card, there is no showing that he distributed such cards among his fellow workers as had the other 3 employees. He and Dzavan had worked together as a

team, as Conquest observed at the time he told Leazotte that he was being terminated. These two employees worked together for approximately 3 years and it is reasonable to infer that the Respondent discharged Leazotte as well as Dzavan because of the close relationship between the two. Although the employees were told they were being discharged either because they were loafing on the job or that their work was unsatisfactory, none of them before had received complaints about his work or had been warned that he was wasting time, each was an employee who had worked for the Respondent for an appreciable period of time, and each had been awarded 2 or more wage increases during the period of his employment. Under such circumstances and in the light of the Respondent's opposition to unionization of its employees as shown by the statements of Owner Latteau and the wage increase granted the employees in September 1962,[5] the statement of Foreman Faulkner to employee Dzavan on June 27, 1963, that if Superintendent Conquest discovered that the employees were distributing union authorization cards he would discharge them on the spot; and the statement of Superintendent Conquest to the employees at the meeting on June 28, 1963, that the Respondent would not accept a union and would fight against it, I find that the reasons told the employees by the Re-

[5]The complaint does not allege and no finding herein is made that this conduct constituted an unfair labor practice and such a finding would be barred in any event by Section 10(b) of the Act. The conduct in question may, and has been, considered, however, as background evidence to throw light upon the later acts of the Respondent alleged as unlawful. *Local Lodge No. 1424, I.A.M., et al. v. N.L.R.B. (Bryan Mfg. Co.)*, 362 U.S. 411; *Axelson Manufacturing Company*, 88 NLRB 761.

spondent as the basis for discharging them cannot be credited and that the true reason for the discharge of Dzavan, Simpson and Diaz was because each of them had engaged in union activities and that Leazotte was discharged because of his close association with Dzavan. The discharges by the Respondent on June 28, 1963, of Dzavan, Simpson, Diaz and Leazotte for the foregoing reasons were acts of discrimination which discouraged union members within the meaning of Section 8(a)(3) of the Act. In addition, the discharges of these employees and the conduct of Foreman William Faulkner on June 27, 1963, in interrogating employees John Dzavan, Jr., as to his union activities, Faulkner's statement on that occasion that Superintendent Conquest would discharge employees who engaged in such activities, and Superintendent Conquest's statements to the assembled employees at the meeting on June 28, 1963, that he would not have a union and would fight against it constituted acts of interference, restraint and coercion of the employees in the exercise of the rights guaranteed them in Section 7, thereby violating Section 8(a)(1) of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminated with respect to the hire and tenure of John Dzavan, Jr., John Simpson, Leroy Leazotte and Ruben Diaz, it will be recommended that the Respondent offer each of said employees immediate and full reinstatement to his former or substantially equivalent position of employment without prejudice to his seniority or other rights and privileges. See *The Chase National Bank of the City of New York, San Juan Puerto Rico Branch,* 65 NLRB 827. It will further be recommended that the Respondent make each of said employees whole for any loss of pay suffered by reason of its discrimination against him. Said loss of pay, based upon earnings which each of said employees would have earned as wages from the date of the discrimination to the date of offer of reinstatement, shall be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.,* 90 NLRB 289. Interest thereon at the rate of 6 per cent per annum shall be added, as provided in *Isis Plumbing and Heating Co.,* 138 NLRB 716.

The unfair labor practices committed in this case strike at the very heart of the Act. *N.L.R.B. v. Entwistle Manufacturing Co.,* 120 F. 2d 532 (C.A. 4). The inference is therefore warranted that the Respondent maintains an attitude of opposition to the fundamental purposes of the Act designed to protect the rights of the employees. It will accordingly be recom-

mended that the Respondent cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.

Conclusions of Law

Upon the basis of the foregoing findings of fact and upon the entire record in this proceeding, I make the following conclusions of law:

1. The Union is, and has been at all times material to the issues in this proceeding, a labor organization, within the meaning of Section 2(5) of the Act.

2. The Respondent is, and has been at all times material to the issues in this proceeding, an employer, within the meaning of Section 2(2) of the Act.

3. By discriminating with respect to the hire and tenure of employment of John Dzavan, Jr., John Simpson, Leroy Leazotte and Ruben Diaz, thereby discouraging membership in a labor organization, the Respondent has engaged in unfair labor practices, within the meaning of Section 8(a)(3) of the Act.

4. By interfering with, restraining and coercing employees in the exercise of rights guaranteed them in Section 7 of the Act, the Respondent has engaged in unfair labor practices, within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this proceeding, I recommend that the Respondent, In-

glewood Park Cemetery Association, Inglewood, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees with respect to their union activities in a manner constituting interference with, coercion, or restraint in violation of Section 8-(a)(1) of the Act.

(b) Threatening to discharge employees because they have engaged in union activities.

(c) Stating to employees that the Respondent would not have and would fight against a union.

(d) Discouraging membership in Miscellaneous Warehousemen, Drivers & Helpers, Local 986, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or any other labor organization of its employees, by discharging or in any other manner discriminating in regard to hire, tenure of employment, or any term or condition of employment, except as authorized Section 8(a)(3) of the Act.

(e) In any other manner interfering with, restraining or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Miscellaneous Warehousemen, Drivers & Helpers, Local 986, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by

an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to John Dzavan, Jr., John Simpson, Leroy Leazotte and Ruben Diaz immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges.

(b) Make whole John Dzavan, Jr., John Simpson, Leroy Leazotte and Ruben Diaz for any loss of pay suffered by reason of the discrimination against them in accordance with the method set forth above in the section entitled "The remedy."

(c) Preserve until compliance with any order for reinstatement or backpay made by the National Labor Relations Board is effectuated and make available to the said Board, and its agents, upon request, for examination and copying, all payroll records, Social Security payment records, timecards, personnel records and reports, and all other records relevant to a determination of the amount of backpay due, and to the reinstatement and related rights provided under the terms of any such order.

(d) Post in conspicuous places at its usual place of business located in Inglewood, California, including all places where notices to employees are customarily posted, copies of the notice[6] attached hereto as an Appen-

[6]Since notices are customarily framed in the language of the statute and because of their technical nature are often difficult for employees to undetstand, I am recommending that the notice in this case embody the simplified form which appears in the appendix.

dix.[7] Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region of the National Labor Relations Board, shall, after being duly signed by an authorized representative of the Respondent, be posted by it immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in such conspicuous places. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Twenty-first Region in writing within 20 days from the date of the receipt by the Respondent of a copy of this Decision what steps the Respondent has taken to comply therewith.[8]

It is further recommended that unless on or before 20 days from the date of the receipt of this Decision the Respondent notify the Regional Director that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take the action aforesaid:

Dated:

DAVID KARASICK
David Karasick
Trial Examiner

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[7]In the event that this recommended order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's order be enforced by a decree of the United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[8]In the event that this recommended order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this order what steps the Respondent has taken to comply therewith."

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO

The Recommended Order of a Trial Examiner of the National Labor Relations Board, we are posting this notice to inform our employees of the rights guaranteed them in the National Labor Relations Act:

WE WILL NOT interfere with the rights of our employees under the law by questioning them about their union activities.

WE WILL NOT threaten to discharge our employees because they have engaged in union activities.

WE WILL NOT tell our employees that we will not have a union or that we will fight against it.

WE WILL offer immediately to the employees named below the jobs they held before they were discharged, or jobs like them, without loss of seniority or any other rights and privileges, and we will give each of the employees named below whatever backpay he has lost:

JOHN DZAVAN, JR.
LEROY LEAZOTTE
JOHN SIMPSON
RUBEN DIAZ

ALL OUR EMPLOYEES have the right to join or assist MISCELLANEOUS WAREHOUSEMEN, DRIVERS & HELPERS, LOCAL 986, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, or

any other union. WE WILL NOT question our employees as to whether they engage in union activities or threaten them for doing so or take any action against them for doing so.

INGLEWOOD PARK CEMETERY ASSOCIATION
(Employer)

Dated .....By .....
(Representative) (Title)

NOTE: We will notify the above-named employees, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

Information regarding the provisions of this notice or compliance with its terms may be secured from the Regional Office of the National Labor Relations Board, 849 So Broadway, Los Angeles, California 90014 (Telephone No. 688-5204).

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

National Labor Relations Board, *Petitioner*,
vs.
Inglewood Park Cemetery Association, *Respondent*.
No. 19,741

[January 14, 1966]

Petition to Enforce an Order of the National Labor Relations Board.

Before: POPE, DUNIWAY, and ELY, Circuit Judges

ELY, Circuit Judge:

The National Labor Relations Board petitions, under section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(e), for a decree enforcing its order issued against respondent, Inglewood Park Cemtery Association. Respondent urges that we deny the petition on the ground that the Board lacked jurisdiction for the issuance of its order.

The Board concluded that the respondent violated section 8(a)(1) and (3) of the NLRA,[1] by interrogating and threatening its employees with regard to their protected activities, by discharging three employees be-

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[1] "Sec. 8(a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * * *" 29 U.S.C. § 158(a)(1),(3). Section 7 provides in part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, . . .' and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, ..." 29 U.S.C. § 157.

cause of their activities in behalf of the union, and by discharging a fourth employee because of his close association with the union organizers. The Board's order requires respondent to cease and desist from the unfair labor practices found and from, in any other manner, interfering with, restraining, or coercing its employees in the exercise of their protected activities, and affirmatively requires respondent to reinstate the discharged employees immediately to their former or substantially equivalent positions, to make them whole for any loss of pay they may have suffered by reason of respondent's discriminatory conduct, to preserve and make available records relevant to the computation of backpay due, and to post appropriate notices.

In our court, respondent does not challenge the conclusions and order of the Board as they pertain to unfair labor practices; hence, our consideration is confined to the Board's conclusion that respondent's business affects interstate commerce within the meaning of the Act and that it would effectuate the policies of the Act for it to assert jurisdiction.

Respondent is a California corporation engaged in the operation of a cemetery located in Inglewood, California. From a period beginning July 1, 1962, and ending June 30, 1963, during which the four employees were discharged, the respondent received in excess of $500,000 from the sale to the public of services, burial lots, crypt spaces, and related items. During the fiscal year period, respondent purchased $3,086.31 worth of goods from sources outside the State of California.

"The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . [and] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, . . ."

U.S. Const. art. I, § 8. The Board derives its existence, power, and direction from national labor legislation enacted by Congress under the authority of article I, section eight of the Constitution. Section 10(a) of the NLRA provides that "The Board is empowered, . . ., to prevent any person from engaging in any unfair labor practice . . . affecting commerce." 29 U.S.C. §160(a). "Commerce" is defined as "trade, traffic, commerce, transportation, or communication among the several States, ..." (29 U.S.C. § 152(6)) and "affecting commerce" is defined as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce" (29 U.S.C. § 152(7).

The respondent contends that its activities are essentially local, that the doctrine of *de minimis* is applicable as to its interstate purchases, and, thus, that its operations do not "affect commerce".

It has been established that it is within the province of Congress to regulate essentially local activity if such activity affects commerce among the several states. *Wickard v. Filburn,* 317 U.S. 111, 87 L. Ed. 122, 63 Sup. Ct. 82 (1942). It is also established that "Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause." *NLRB v. Reliance Fuel Oil Corp.,* 371 U.S. 224, 226, 9 L. Ed. 2d 279, 83 Sup. Ct. 312 (1963). (Emphasis supplied.) And with regard to the exercising by the Board of its jurisdiction the Supreme Court has stated:

> "The Act establishes a framework within which the Board is to determine 'whether proscribed practices would in particular situations adversely

> affect commerce when judged by the full reach of the constitutional power of Congress. Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce.' *Polish Alliance v. Labor Board,* 322 U.S., at 648. See also *Labor Board v. Fainblatt,* 306 U.S., at 607-608."

NLRB v. Reliance Fuel Oil Corp., 371 U.S. at 226.

We cannot ignore the fact that business concerned with death is "big" business,[2] and the Board has determined that in the interlacings of business across state lines the particular operation involved can and may affect interstate commerce adversely.

As to the respondent's contention that the $3,086.31 in purchases outside the State of California is *de minimis,* we are confronted with a problem not capable of solution by application of precise mathematical formula. We have held that a dry-cleaning establishment doing approximately $12,000 per year in interstate business fell within the jurisdiction of the Board. *N.L.R.B. v. Stoller,* 207 F.2d 305 (9th Cir. 1953), *cert. denied,* 347 U.S. 919, 98 L. Ed. 1074, 74 Sup. Ct. 517 (1954). The Seventh Circuit has held that a local transit company which purchased, locally, approxi-

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[2]See generally Harmer, The High Cost of Dying (1963); Mitford, The American Way of Death 39-41, 49-50 (1963); Sher, Funeral Prearrangement: Mitigating the Undertaker's Bargaining Advantage, 15 Stan. L. Rev. 415, 418-19 and nn. 12-15 (1963).

mately $2,000 worth of materials originating outside the state in which it operated was subject to the jurisdiction of the Board, saying, as to the *de minimis* argument of the company, "The time has not yet arrived when $2,000 is but a trifle." *NLRB v. Aurora City Lines, Inc.*, 299 F.2d 229, 231 (7th Cir. 1962). The Supreme Court has written that "we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which the courts would apply the maxim *de minimis*." *NLRB v. Fainblatt*, 306 U.S. 601, 607, 83 L. Ed. 1014, 59 Sup. Ct. 668 (1939). Here, the close question has troubled us. We are required, however, to accord a proper measure of respect to Board conclusions. In the light of that consideration, we, with a degree of reluctance, affirm the determination that, under all the circumstances shown by the record, the *de minimis* maxim cannot be applied to vitiate the order.

The Petition for Enforcement is granted.[3]

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[3]In some cases we have held that the inclusion of the phrase "in any other manner" was improper. See, *e.g., NLRB v. Phaostron Instrument & Electronic Co.*, 344 F.2d 855 (9th Cir. 1965). In this case, however, the respondent has made no objection to the form of the order, and the history of the dispute, developed by testimony which the respondent did not deny, affords some justification for the order's broad direction. The four discharged employees had worked for the respondent for lengthy and continuous periods of time. One of them, a power mower operator, had been engaged in the employment for approximately eleven years. All of them had been given wage increases from time to time, and prior to the period when they commenced to engage in union activities, no complaints had been made of their work. When the activities began, the respondent's superintendent advised the employees that he would not have a union and that he would fight against it. He undertook in other comments to discourage the activity, and when the employees were discharged, they were given false reasons for the termination of their work. The respondent has not contested the claims of unfair labor practices and in our court makes no contention that the Board's findings of such practices were improper.

APPENDIX D.

Record on Jurisdictional Issue.

Complaint and Notice of Hearing issued by General Counsel of N.L.R.B.

2. Petitioner is now, and has been at all times material herein, a California corporation engaged in the operation of a cemetery in Inglewood, California. During the period from July 1, 1962, through June 30, 1963, the Petitioner received an amount in excess of $500,000 from the sale to the public of services, burial lots, crypt spaces, and related items, and purchased goods directly from outside the State of California totaling $3,086.31.

3. Petitioner is now, and has been at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

11. The activities of Petitioner described in paragraphs 6 through 10 above, occurring in connection with the operations of Petitioner described in paragraphs 2 and 3 above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, and tend to lead, and have led, to labor dispute burdening or obstructing commerce or the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

12. The activities of Petitioner as set forth in paragraphs 6 through 11 above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

Answer of Respondent:

II

Admits the allegations of Paragraph 2.

III

Denies each and every allegation in Paragraph 3.

VII

Denies each and every allegation in Paragraphs 7, 8, 9, 10, 11, and 12.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1200

FIRST CONGREGATIONAL CHURCH OF LOS ANGELES, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22–26) is reported (*sub nom. National Labor Relations Board* v. *Inglewood Park Cemetery Association*) at 355 F. 2d 448. The Board's decision and order (Pet. App. 5–21) are reported at 147 NLRB 803.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1966 (Pet. 2). The petition for certiorari was filed on April 8, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

A California corporation, which had annual gross receipts in excess of $500,000 from the operation of a

cemetery and made direct purchases outside of California totaling more than $3,000, was held by the Board to have committed unfair labor practices by threatening and discharging employees for exercising rights guaranteed by Section 7 of the National Labor Relations Act. The questions presented are:

1. Whether the operations of the corporation affected commerce, within the meaning of the Act, so as to give the Board jurisdiction.

2. Whether the Board abused its discretion in asserting its jurisdiction.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in an Appendix to the Petition, pp. 2–4.

STATEMENT

Petitioner is the successor to, and has been substituted for, the Inglewood Park Cemetery Association (Pet. 1,n.) a California Corporation, which engaged in the operation of a cemetery located in Inglewood, California. From July 1, 1962, through June 30, 1963, petitioner received in excess of $500,000 from the sale to the public of services, burial lots, crypt spaces, and related items, and purchased goods directly from outside the State of California valued at $3,086.31. (Pet. App. 8, 27–28.)

On June 27, 1963, petitioner's foreman questioned employee John Dzavan, Jr., concerning his union activity and threatened to discharge any employee who

passed out union cards. (Pet. App. 9; Tr. 17–19.)[1] The next day petitioner's superintendent, at a meeting of all employees, told them that he would not have a union and would fight against it (Pet. App. 10; Tr. 19–20, 53, 69). After the meeting the superintendent discharged Dzavan and two other employees who had been instrumental in passing out union cards, as well as another employee closely associated with them. (Pet. App. 10; Tr. 21, 23, 44–45, 51, 54–55.)

Upon the foregoing facts, the Board, in agreement with the Trial Examiner, concluded that petitioner's cemetery business affected interstate commerce within the meaning of the Act, and that it would effectuate the policies of the Act to assert jurisdiction over that business (Pet. App. 5–6, 8, 14–16, 24). The Board further concluded that petitioner violated Section 8(a)(1) of the Act by interrogating and threatening its employees concerning their union activities, and Section 8(a) (3) and (1) by discharging the four employees because of their union or other protected activities (Pet. App. 5, 14, 16). The Board ordered petitioner to cease and desist from the unfair labor practices found, and to reinstate with back pay the employees it had discriminatorily discharged (Pet. App. 6, 17–19).

The court of appeals sustained the Board's findings and enforced the Board's order in its entirety (Pet. App. 22–26). No contention was made before the court that the Board's findings, aside from the jurisdictional finding, were improper (Pet. App. 26).

[1] "Tr." references are to the stenographic transcript, reproduced as Volume II, Transcript of Record, in the court below.

ARGUMENT

1. Section 10(a) of the Act states that the jurisdiction of the Board extends to any person "* * * engaging in any unfair labor practice * * * affecting commerce." This Court "has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause." *National Labor Relations Board* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226. Hence, the Act applies even to local activity if it affects commerce among the several states. Moreover, "the operation of the Act [does not] depend on any particular volume of commerce affected more than that to which courts would apply the maxim *de minimis.*" *National Labor Relations Board* v. *Fainblatt*, 306 U.S. 601, 607; *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 684–685. And, as the court below recognized (Pet. App. 25), the Board may appropriately consider whether " 'the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce.' " *National Labor Relations Board* v. *Reliance Fuel Oil Corp., supra*, quoting from *Polish National Alliance* v. *National Labor Relations Board*, 322 U.S. 643, 648.

Under these principles, petitioner's cemetery business is subject to the Act as a matter of law, for a disruption of that business by a labor dispute would, at a minimum, tend to interfere with more than $3,000

of interstate purchases. Contrary to petitioner's contention (Pet. 16–20), this volume of commerce was not *de minimis*. "*De minimis* in the law has always been taken to mean trifles—matters of a few dollars or less." *National Labor Relations Board* v. *Suburban Lumber Co.*, 121 F. 2d 829, 832 (C.A. 3), certiorari denied, 314 U.S. 693. Annual purchases in interstate commerce which amount to more than $3,000 are not mere trifles. Moreover, the application of the *de minimis* standard by the court below here is consistent with other decisions under the Act. See *National Labor Relations Board* v. *Aurora City Lines, Inc.*, 299 F. 2d 229, 231 (C.A. 7); *National Labor Relations Board* v. *Stoller*, 207 F. 2d 305, 307 (C.A. 9), certiorari denied, 347 U.S. 919; cf. *National Labor Relations Board* v. *Holiday Hotel Management Co.*, 311 F. 2d 380, 381 (C.A. 10).[2]

2. Petitioner's further contention (Pet. 21–22) that the Board, in any event, should have declined to exercise jurisdiction over its operation likewise presents no issue warranting further review. The extent to which the Board asserts its legal jurisdiction, "is a

[2] The cases cited by petitioner (Pet. 19) do not deal with the assertion of the National Labor Relation Board's statutory jurisdiction. In *Pennsylvania Labor Relations Board* v. *Friedberg*, 395 Pa. 294, 148 A. 2d 909, appeal dismissed, 361 U.S. 2, the employer involved, unlike petitioner, would not have qualified under the Board's self-imposed jurisdictional standards (see p. 6, *infra*), and therefore the Pennsylvania court held that the state labor agency could assert jurisdiction. *Industrial Association of San Francisco* v. *United States*, 268 U.S. 64, an anti-trust case, dealt with employers involved in labor disputes prior to enactment of the National Labor Relations Act. See *United States* v. *Frankfort Distilleries*, 324 U.S. 293, 297.

matter of administrative policy within the discretion of the Board." *Lucas County Farm Bureau Cooperative Association* v. *National Labor Relations Board,* 289 F. 2d 844, 845–846 (C.A. 6), certiorari denied, 368 U.S. 823. Accord: *National Labor Relations Board* v. *W. B. Jones Lumber Co.,* 245 F. 2d 388, 391 (C.A. 9); *National Labor Relations Board* v. *Stoller, supra; National Labor Relations Board* v. *F. M. Reeves & Sons, Inc.,* 273 F. 2d 710, 712 (C.A. 10), certiorari denied, 366 U.S. 914. To guide it in exercising that discretion, the Board has established certain jurisdictional standards.[3] Since petitioner's cemetery business had a gross volume of at least $500,000, it satisfied the Board standard applicable to its operations. See *Carolina Supplies & Cement Co.,* 122 NLRB 88, 89. Nor does the Board's declination of jurisdiction over such operations as racetracks, hospitals, and real estate brokers (Pet. 21) establish that it was arbitrary in asserting jurisdiction over cemeteries. The Board could well conclude, as it has, that there are sufficient

[3] Section 14(c)(1) of the Act recognizes the Board's authority to do so. It reads as follows:

"The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction * * *."

differences between the former operations and cemeteries to warrant a different jurisdictional policy.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
ROBERT A. GIANNASI,
Attorney,
National Labor Relations Board.

MAY 1966.

[4] The Board has consistently asserted its jurisdiction over all phases of the "business concerned with death" (Pet. App. 25). See *National Labor Relations Board* v. *Miscellaneous Drivers & Helpers Local 610*, 293 F. 2d 437, 440 (C.A. 8); *National Labor Relations Board* v. *Forest Lawn Memorial-Park*, 206 F. 2d 569, 571 (C.A. 9), certiorari denied, 347 U.S. 915; *W. W. Chambers Co.*, 124 NLRB 984, 985, enforced, 279 F. 2d 817 (C.A.D.C.).

U.S. GOVERNMENT PRINTING OFFICE: 1966